APPENDIX

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF CERTAIN SUGAR SYRUPS

August 25, 1999

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter and the treatment relating to the classification of certain sugar syrups.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking New York Ruling Letter (NYRL) 810328, dated May 15, 1995, concerning a mixture of cane or beet sugar and molasses with the addition of water to make a syrup, and to revoke any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published in Vol. 33, No. 22/23, of the CUSTOMS BULLETIN, dated June 9, 1999.

FOR FURTHER INFORMATION CONTACT: Norman W. King, General Classification Branch, Office of Regulations and Rulings (202) 927-1109.

EFFECTIVE DATE: This notice is effective for merchandise entered or withdrawn from warehouse for consumption on or after November 8, 1999.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In NYRL 810328, Customs ruled that a product merely described as a sugar syrup containing sugar solids, water, and more than 60 of soluble non-sugar solids, was classified in subheading 1702.90.4000, HTSUS. Customs received what is referred to as a joint petition under 19 U.S.C. 1516 (with an option to proceed under 19 U.S.C. 1625), dated January 14, 1998, from the United States Cane Sugar Refiners' Association and the United States Beet Sugar Association, contesting the classification of a sugar syrup in subheading 1702.90.4000, HTSUS, a provision not subject to a tariff rate quota, and requesting classification under other provisions in heading 1702, HTSUS, which are subject to tariff rate quotas.

It is the position of the Associations that the soluble non-sugar solids referred to in NYRL 810328, consist of a mixture of cane or beet sugar and molasses with added water in Canada and then the molasses is extracted after importation. Thereafter, the sugars are used in the production of food products. Further, it is the position of the Associations that they know of no commercial use for the syrups as imported. It is their position that the addition and then the extraction of the molasses was to avoid the tariff rate quotas.

Customs invited the representatives of the recipient of NYRL 810328 to submit comments and legal briefs concerning the various issues. After a thorough review, pursuant to 19 U.S.C. 1625(c)(2), Customs published in the CUSTOMS BULLETIN, Vol. 33, No. 22/23, dated June 9, 1999, a notice that it intended to revoke NYRL 810328. The notice included a copy of the proposed revocation letter (961273), and noted that written comments from the public must be received before July 9, 1999. Upon the request of the Government of Canada and others, the comment period was extended until the close of business on August 9, 1999 (see page 14, CUSTOMS BULLETIN, Vol. 33, No. 29/30, dated July 28, 1999.) Approximately 30 comments were received in addition to a letter signed by 26 U.S. Senators and comments from two U.S. Congressmen. Generally, the commenters either supported or opposed the revocation of the ruling based on economic considerations. Extensive legal arguments also were submitted. Two basic legal issues were called into question; the use of the procedures under 19 U.S.C. 1625 and tariff engineering. Customs responses to these issues follow.

PROCEDURES UNDER 19 U.S.C. 1516 VERSUS 19 U.S.C. 1625

Counsel for the recipient of NYRL 810328, supported by trade associations representing the interests of importers and exporters, and others, challenged Customs legal authority to proceed in this matter under 19 U.S.C. 1625 and requested

that Customs withdraw the notice and require the petitioners to proceed under 19 U.S.C. 1516 with another publication by Customs in the Federal Register (FR) and a comment period. The result of this position, if accepted, would prevent Customs from acting on its own initiative to revoke or modify a ruling brought to its attention which Customs believes is not in conformity with the law. Prior to and after the amendments on December 8, 1993, 19 U.S.C. 1625 contains no such limiting procedures. Rather, 19 U.S.C. 1625, as amended, sets forth mandatory procedures for Customs to follow when revoking or modifying rulings.

The Customs Service is mandated to correctly administer the tariff laws of the United States. Customs has the right, indeed the obligation, to take corrective action when information comes to its attention, from whatever source, that merchandise is being improperly classified. In this case, Customs considered the information provided by the domestic industry and concluded that the classification ruling it had issued to the importer was incorrect. Consequently, Customs proposed to revoke the ruling under the procedures set forth in 19 U.S.C. 1625. The Courts have concluded that the existence of the domestic interested party petition under 19 U.S.C. 1516 does not preclude Customs from revoking a ruling. The Customs Court specifically dealt with a similar argument in the case of Way Distributors, Inc., v. U.S., 85 Cust. Ct. 54, C.D. 4870 (1980). An association representing the interests of domestic manufacturers brought to the attention of Customs that a ruling was incorrect and Customs revoked the ruling. One of the issues before the court was whether Customs revocation was invalid because the domestic interests should have been required to proceed under 19 U.S.C. 1516. The court stated as follows:

> In making this rule [revocation of the ruling] the agency was not required to consult plaintiff nor was it required to avoid communication with those advocating an interpretation adverse to plaintiff. In-

> terested parties may communicate their views to the agency at any time and in any manner not inconsistent with statute or law. The existence, of section 1516 * * * which allows an American manufacturer to complain and seek to change the classification of imported merchandise does not mean that section [1516] is the only permissible way for American manufacturers to attempt to bring about a change in import classification. Such a restrictive view finds no support in law or legislative history.

The Way decision was affirmed by U.S. Court of Customs and Patent Appeals, 68 C.C.P.A. 57, (1981), 653 F.2d 467. The appellate court quoted the above paragraph and added that section [1516] "does not deprive the Customs Service of authority to issue an interpretative ruling following informal consultation with representatives of U.S. industry.["]

At the time of the Way decision, the statutory safeguards provided by Congress in 1993, with the amendments to 19 U.S.C. 1625, did not exist. The amendments imposed mandatory procedures for Customs to follow when revoking or modifying rulings. Those procedures include publication in the CUSTOMS BULLETIN of a proposal to revoke or modify an administrative ruling which has been in effect for at least 60 days, a comment period from the public, and a 60 day delayed effective date if it is determined that a final ruling to revoke or modify the ruling will be issued. None of these new procedures affect the Way decision.

Prior to the 1993 amendment to 19 U.S.C. 1625, an importer would be given only 30 days notice that the Secretary of the Treasury agreed with the domestic industry that its prior classification of the imported merchandise was incorrect. See 19 U.S.C. 1516(b). However, Congress provided mandatory procedures in 19 U.S.C. 1625, if a prior interpretive ruling has to be modified or revoked. In this case, the new ruling is not effective until 60 days after the date of its

publication. In the instant case, the domestic interests sought Customs review pursuant to 19 U.S.C. 1516, with an option to proceed under 19 U.S.C. 1625. As part of the statutory process contained in 19 U.S.C. 1516(a)(1), Customs determined, based on additional facts brought to its attention, that NYRL 810328 appeared to be incorrect. In this instance, the ruling recipient participated in the process, met with Treasury Department officials and made submissions to Customs prior to any publication under either 19 U.S.C. 1516 or 19 U.S.C. 1625.

Once Customs reviewed the submissions from both the domestic petitioners and the ruling recipient, Customs decided to proceed to revoke the ruling. At that point, as the Way court indicated, who provided the initial information is irrelevant. Congress provided ruling recipients, in such a case, with a set of statutory protections under 19 U.S.C. 1625, as amended in 1993. Therefore, the statement in the Way decision by the appellate court that 19 U.S.C. 1516 "does not deprive the Customs Service of authority to issue an interpretative ruling following informal consultation with representatives of U.S. industry" is still in effect, notwithstanding the procedural amendments to 19 U.S.C. 1625. Customs is proceeding under the procedures of 19 U.S.C. 1625.

TARIFF ENGINEERING

Almost all of the commenters that oppose the revocation support the position that Customs, in the absence of a "use" provision of the tariff schedule, has no discretion to consider the commercial identities and/or uses of imported merchandise and must classify imported merchandise in its condition as imported. We believe this position is misplaced.

The concept of tariff engineering is based on the long standing principles of the tariff laws that merchandise is classifiable in its condition as imported and that an importer has the right to fashion merchandise to obtain the lowest rate of

duty and the most favorable treatment. The Production or manufacture of an article may, and often does, include several manufacturing or production steps with each step potentially resulting in a new article of commerce. Under the concept of tariff engineering, an importer should be allowed to choose to import its merchandise at any step that obtains the most favorable treatment. However, we believe that there are limitations to that concept and that, in the case before us, the importer has gone beyond what is permissible under the concept of tariff engineering.

In the case before us, the importer has engaged in a process which is not a genuine step in manufacturing or production of an article. Sugar and molasses are mixed in Canada. Water is then added to the mixture to make a sugar syrup. Subheading 1702.90.10, HTSUS, provides for sugar syrups derived from cane or sugar beets, containing soluble nonsugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids, subject to tariff rate quotas. The molasses with its impurities added to the sugar is sufficient to assure that the syrup exceeds the 6 percent limitation so that the syrup is classified in a provision not subject to quota. If the syrup was further used in its condition as imported, in the next step in producing an article of commerce, this may satisfy the tariff engineering concept. However, after importation, the molasses is removed and the sugar is used in the same manner as sugar subject to quota. In its condition as imported, we conclude that there is no commercial use for the syrup as imported. Courts have considered this issue in many cases and have set forth guidelines as articulated in Savannah Foods Sugar Refining Corp. v. U.S., 20 C.C.P.A. 272 (1932). The fundamental issue involved in this case is whether the facts go beyond permissible tariff engineering. The position of Customs is that the processing in this case is not legitimate tariff engineering. But rather, it is merely "disguise or artifice" intended to escape a higher rate of duty such as a quota tariff rate.

The recipient of the ruling claims that "[i]n the production of sugar products, both liquid and granular, molasses is frequently used as an ingredient to achieve desired polarities." However, the molasses is added to the sugar in this case to achieve a desired level of soluble non-sugar solids for the avoidance of quota. After importation, the molasses is removed. According to comments from a domestic sugar refiner, it makes no financial sense, absent a desire to avoid the sugar tariff, for a conventional sugar operation to either enrich a liquid (syrup or molasses) stream with sugar or to add molasses to such a stream. Sugar operations separate sugar from the liquid or molasses phase, they do not separate the sugar and then introduce molasses to the sugar, effectively nullifying the refining operation. Consequently, Customs has concluded that this operation is not legitimate tariff engineering. Rather, it is an example of an importer creating a product that "is within the letter of a statute [subheading 1702.90.40, HTSUS] and yet not within its spirit nor within the intention of its makers." US. v. Aetna Explosives Co., 9 Ct. Cust. Appls. 298, 306 (1919) aff'd 256 U.S. 402 (1921). The U.S. Supreme Court recognizes that this rule is not inconsistent with the principle that merchandise should be classified in its condition as imported. Ibid.

The legislative history of the predecessor statutes to subheading 1702.90.40, HTSUS, clearly indicate that Congress intended this nonquota provision to be used to classify merchandise that does not compete with sugar. In enacting the Sugar Act of 1937 Congress concluded that sugar syrups containing soluble non-sugar solids (excluding any foreign substance that may have been added or developed in the product) equal to more than 6% of the total soluble solids did not compete with sugar. For this reason they were excluded from the definition of liquid sugar in that Act. Consequently, they were not subject to the quota and high rate of duty applicable to sugar. Sugar Act of 1937, ch.898, § 101(f), 50 Stat. 903 (1937). Sugar Hearings on H.R. 5236, Before the Subcommittee of the House Agriculture Committee, 75th

Cong. 41-44 (1937). Later tariff provisions retained that percentage. See explanation of the conversion of Paragraph 502 of the Tariff Act of 1930; as amended to item 155.35 of the TSUS, United States Tariff Commission, Tariff Classification Study, Schedule 1 Part 10, November 15, 1960. TSUS item 155.35, for sugar syrups, became subheading 1702.90.40, HTSUS, as set forth in the notice of proposed revocation.

It is equally clear that the syrup in its condition as imported competes with sugar. In their comments on the proposed revocation, two Louisiana sugar refiners claim to have lost sales of 25,000 tons of sugar per year as the result of the importations under NYRL 810328. The Department of Agriculture acknowledged that as the result of the sugar syrup importations, it was necessary to reduce the total quantitative limitations of sugar under the low tariff rate quotas, by an amount equivalent to the forecast of syrup imports by 100,000 short tons for the fiscal year 1999.

Given the legislative intent of the Congress in creating the predecessor statutes to subheading 1702.90.40, HTSUS, to apply to products that do not compete with sugar and the evidence that the product in this case does compete with sugar (information which Customs did not consider or did not possess at the time it issued NYRL 810328), Customs is obliged to revoke its earlier ruling in order to fulfill its obligation to interpret the tariff in terms of commercial reality.

As stated in the proposed notice this revocation action will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period and none have. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(C)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical

transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NYRL 810328 and revoking any other ruling not specifically identified, to reflect the proper classification of the sugar syrup. Headquarters Ruling Letter 961273 revoking NYRL 810328 and reflecting the proper classification for the sugar syrup is set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

Dated: August 25, 1999.

JOHN DURANT,

Director,

Commercial Rulings Division.

[Attachment]

[Attachment]

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,

Washington, DC, August 25, 1999.

CLA-2 RR:CR:GC 961273K

Category: Classification

Tariff No. 1702.90.1000 and 1702.90.2000

DANIEL J. GLUCK, ESQ.

SERKO & SIMON

One World Trade Center, Suite 3371

New York, NY 10048

Re: Revocation of New York Ruling Letter (NYRL) 810328; Sugar Syrups.

DEAR MR. GLUCK:

In response to letters from your client, Heartland By-Products Inc. (Heartland), dated April 18 and 19, 1995, the Customs Service issued NYRL 810328, dated May 15, 1995, which held that certain sugar syrups from Australia, were classified as other sugar syrups derived from sugar cane or sugar beets, containing soluble non-sugar solids (excluding foreign substances that may have been added or developed in the product) equal to more than 6% by weight of the total soluble solids, in subheading 1702.90.4000, Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed that rifling and are of the opinion that the classification set forth is not correct. A notice of proposed revocation of NYRL 810328 was published in the CUSTOMS BULLETIN, Vol. 33, No 22/23, dated June 9, 1999. After further review of the comments received in response to this notice, this letter is to advise you that NYRL 810328 no longer reflects the views of the Customs Service and is revoked.

Facts:

NYRL 810328 is void of any background information other than merely describing the merchandise that Heartland planned to import as a sugar syrup produced from sugar cane or sugar beet and will contain sugar solids, water and more than 6 percent soluble non-sugar solids and the conclusion that the syrups were classified in subheading 1702.90.4000. HTSUS.

Subheading 1702.90.1000, HTSUS (1995), provides for other sugar syrups not containing added flavoring or coloring matter, derived from sugar cane or sugar beets, and containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids, subject to the quantitative quota limitations of U.S. Additional Note 5 to Chapter 17, with a general rate of duty at 3.6606 cents per kg of the total sugars, and a special rate of duty at 0.4381 cents per kg of the total sugars, if the sugar syrups qualify as North American Free Trade Agreement (NAFTA) originating goods from Canada. If the quantitative limitations have been reached, the syrups are classified in subheading 1702.90.2000, HTSUS (1995), an over the tariff rate quota provision, with duty at the general rate of 41 cents per kg and no special rate for goods originating from Canada.

Subheading 1702.90.4000, HTSUS (1995), provides for other sugar syrups not containing soluble non-sugar solids equal to 6 % or less by weight of the total soluble solids, not subject to a quantitative quota limitation, and such syrups were dutiable at the 1995 general rate of 0.7 cents per liter and a special rate of 0.2 cents per liter if the sugar syrups qualify as NAFTA originating goods from Canada.

The rates of duty and quantitative quota limitations of the 1995 tariff may have changed, but these provisions of the tariff are identical in the 1999 edition of the HTSUS.

We informed you in our letter dated April 1, 1998, that under 19 U.S.C. 1516 (with an option to proceed under 19 U.S.C. 1625), we had received a joint petition dated January 14, 1998, from the United States Cane Sugar Refiners' Association and the United States Beet Sugar Association, contesting the classification of the sugar syrups in subheading 1702.90.4000, HTSUS, a provision not subject to a tariff rate quota, and requesting classification under other provisions in heading 1702, HTSUS, which are subject to tariff rate quotas. It is the position of the Associations that non-soluble sugar solids consisting of molasses are added to the sugar syrups in Canada to avoid tariff rate quotas on sugars and sugar syrups. The Associations allege that Heartland's product competes directly with sugar and sugar syrups that are subject to tariff rate quotas. The Associations also allege that Heartland extracts the molasses, the non-sugar solids, from the imported syrups and sells the sugar from that process in the United States. The residual non-sugar solids, the molasses, are returned to Canada. According to the Associations, there is no commerce in the merchandise in its condition as imported. In effect, the Associations are saying that the addition and extraction of the molasses is an artificial process. The importer is using the process only to avoid the tariff rate quotas.

As stated, NYRL 810328 merely described a sugar syrup as containing sugar solids, water, and more than 6% of soluble non-sugar solids, and held that the syrup was classified in subheading 1702.90.4000, HTSUS. Since the ruling was issued, we have learned that molasses is added in Canada, that the molasses is extracted after importation, and that the syrup is subsequently used to produce other food products. In the original requests for a ruling dated April 18 and 19, 1995, Heartland described the mixing of sugar and molasses with the addition of water in Canada but did not reveal its plans to extract the molasses after importation in producing a sugar syrup for use in making food products. It is your position that subheading 1702.90.4000, HTSUS, is not a "use" provision and therefore, your client had no responsibility to de-

scribe the use of the syrup upon importation and that Customs did not ask for such information. Without addressing your position, it is clear that Customs did not have the benefit of this essential information in issuing NYRL 810328, until the petitions were submitted by the Associations.

We have carefully reviewed your submission dated May 18, 1998, in response to our letter dated April 1, 1998, in which we afforded you the opportunity to respond to the substance of the claims of the Associations. We advised you that we were concerned with the commercial identity and/or use of the product in its condition as imported. Specifically, we asked if there are any known commercial uses of the product without the extraction of the molasses? The question also involved whether your client uses it directly as imported in the manufacture of other food products, or sells it to others as imported for use in producing food products, without the extraction of the molasses? Thereafter, we received further submissions dated June 25, August 26, September 24, and October 7, 1998. For all practical purposes, your responses confirm that the imported syrups consist of sugar that was mixed with molasses with the addition of water in Canada, and after importation, the molasses was extracted. You further confirm that some of the recovered molasses is returned to Canada, some of it is sold for use in animal feed, and, notwithstanding the recovery, some molasses remains in the product or is lost in the process. It is now known, that after applying various proprietary technologies, the syrups are transformed into food grade sugar syrups that would have been subject to the tariff rate quota provisions, if imported in that condition. In your submission of June 25, 1998, you confirmed that the most common use of the product is as a source of sugar. Although you indicated that the imported product (with the molasses) would be used as an ingredient in the production of a food product, you have not demonstrated that it has been used for such purpose. You do not indicate whether the molasses plays a part in manufacturing of a food grade syrup. You do not state any commercial pur-

pose for the addition and subsequent extraction the molasses. In addition, you claim that there were some sales of the product in its condition as imported for use in the production of animal feed. However, no documentary evidence in support of this claim was provided. Laboratory technicians familiar with the industry are of the opinion that the syrups as imported do not contain the raw materials used in the production of animal feed. You submitted documents indicating that there is an interest on the part of potential buyers to purchase the syrup as imported. However, you have provided no evidence that sales have taken place and we must assume that such buyers would also have to remove the molasses and the impurities before the sugar syrup could be used in the production of food products. We conclude, based on the limited unsupported information concerning such sales and uses when compared to the quantities of the syrups imported by your client, that such sales and uses may be considered as de minimis or as igitive uses.

Issue:

The first issue is whether there are commercial identities and/or uses for the product in its condition as imported without the subsequent extraction of the added molasses.

If there are none, then the second issue is how that affects the classification and quota status of the imported product.

Law and Analysis:

Imported merchandise is classifiable under the HTSUS, in accordance with the General Rules of Interpretation. The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the term of the headings of the tariff schedule and any relative Section or Chapter Notes, including Additional U.S. Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be ap-

plied in order. Prior to determining whether the product was correctly classified in NYRL 810328, and not subject to quota, we need to make some preliminary conclusions.

We conclude, based on the available information as discussed above, that there are no commercial identities or commercial uses for the syrups as imported. Furthermore, we conclude that the addition of the molasses prior to importation and the extraction of the molasses after importation is an artifice and that the resulting syrups are used in the same manner as other syrups classified in provisions of the tariff that are subject to tariff rate quota provisions.

We believe that commercial identities or commercial uses may be considered in determining the classification of the sugar syrups and whether the syrups are subject to tariff rate quota provisions. The reasoning for our legal conclusion follows.

The crux of your argument is that Customs has no discretion to classify the merchandise in any manner other than in its condition as imported Worthington v. Robbins, 139 U.S. 337 (1891); United States v. Citroen, 223 U.S. 407 (1912); Mita Copystar America v. United States, 21 F.3d 1079 (Fed.Cir. 1994), and that the importers have the right to fashion merchandise to obtain the lowest rate of duty. Seeberger v. Farwell, 139 U.S. 608 (1891); Magone v. Luckemeyer, 139 U.S. 612 (1891); Merritt v. Welsh, 104 U.S. 694 (1881). Since the imported merchandise is composed of more than 6% of soluble non-sugar solids, it must, according to your position, be classified under subheading 1702.90.4000, HTSUS, free of any tariff-rate quotas for sugar.

However, the Courts have always recognized that [c]lassification is an exercise in assessing the commercial status of particular goods, ***** Alcan Aluminum Corp. v. U.S., 165 F.3d 898 (Fed.Cir. 1999). In all the cases you cited, the imported merchandise had are recognized commer-

cial identity in its condition as imported, for example "white hard enamel" sold for numerous manufacturing purposes in Worthington, pearls in Citroen, wool fabric with a small percentage of cotton traded as wool fabric in Seeberger and Magone, and sugar in Merritt. Heartland's product is not traded or sold in its condition as imported. Furthermore, Customs has concluded that the processing in this case is a mere artifice. The well recognized principle that "a thing may be within the letter of a statute and yet not within its spirit nor within the intention of its makers" applies in Customs classification cases as it does in other cases. United States v. Aetna Explosives Co., 9 Ct. Cust. Appls. 298, 306 (1919) aff'd 256 U.S. 402 (1921).

In Aetna Explosives, sulfuric acid was added to nitric acid transported from Canada to the United States by rail. At least 20% of the mixture was sulfuric acid which prevented the nitric acid from corroding the tank cars during its transportation. The sulfuric acid was removed after importation. Customs classified the merchandise as a chemical "mixture" or "preparation" under paragraph 5 of the Tariff Act of 1913, subject to a 15 percent rate of duty. Notwithstanding the product fell within the literal terms of the tariff asserted by Customs, the Appeals Court framed the issue as "whether this mixture* * * was an act of preparation or an act of admixture with a purpose of producing a new article." 9 Ct. Cust. Appls. at 302 (Underscoring added). This issue was so framed with full recognition that "the rule which usually obtains [is] that the condition of an article when imported determines its dutiable status." Id. However, the court found no infringement of that rule in deciding that the subject merchandise was not a mixture or preparation for purposes of the tariff law because it "had not reached the state of a commercial mixture contemplated by the statute. It was susceptible of no use other than as nitric acid, which must before use be again treated." 9 Ct. Cust, Appls. at 302-303. The Supreme Court affirmed.

Later cases have held that "a certain amount of ingredient, although substantial; may be ignored for classification purpose, depending upon many different circumstances, including the purpose which Congress sought to bring about by the language used and whether or not the amount used has really changed or affected the nature of the article and, of course, its salability." Varsity Watch Co. v. United States, 34 C.C.P.A. 155, 163 (1947) (Underscoring added.) Heartland did not disclose to Customs in its ruling request that the substance it proposed to import has no commercial identity nor any legitimate commercial purpose. It was only after the Associations complained that the merchandise imported by Heartland should be subject to tariff rate quota that Customs became aware that the imported merchandise had no commercial identity.

You cited many court cases which uphold the right of an importer to fashion its merchandise to obtain a favorable rate of duty upon importation and we agree with this well founded principle of the tariff laws. There are many provisions in the tariff in which classification changes occur when raw materials are further processed. In such situations, there are continuing processing steps to reach the end product. Situations in which there are no commercial purposes for a process, such as the addition and then the removal of molasses from sugar to avoid classification in a tariff provision subject to quota, cross the line of permissible fashioning to one of artifice to obtain favorable tariff treatment by the avoidance of a tariff rate quota.

Product formulation to avoid the sugar tariff was an issue in Savannah Sugar Refining Corp. v. United States, 20 C.C.P.A. 272 (1932), in which the appeals Court affirmed the decision of the Customs Court, Treasury Decision 45477. The importer advised Customs beforehand what was intended. Water and a small portion of formaldehyde were added to raw sugar to change the testing by the polariscope for the sole purpose of obtaining a lower rate of duty. After

importation, the mixture was further mixed with other raw sugars and refined. The water and formaldehyde had no value and both passed off in evaporation. There was no commercial use or commercial identity of the syrup other than the avoidance of the higher rate of duty. The Appeals Court, at page 278, stated that "no evidence was adduced showing that the product, as imported, has ever been bought and sold in the wholesale trade and commerce of the United States as sugar sirup. Indeed, except for the transaction involved, it was not shown that any such product ever existed either in the United States or elsewhere in the world, under any name, title, or designation whatsoever. So far as the record is concerned, the single importation at issue was sui generis." The Court concluded that there was no identity and held that the imported sugar syrups were subject to the higher rates of duties.

In response to the principle that an importer has the right to legitimately reduce its tax burden, the Customs Court stated as follows;

It has been established that an importer may cause his merchandise to be so manufactured as to secure for him the most favorable rate possible on importation, but the decision that established that principle, Merritt v. Welsh, 104 U.S. 694, 26 L. Ed. 896, clearly indicates that it might be a different matter if the article were treated in such a matter after manufacture as to make the manufactured article appear different from what it really was for the purpose of evading the revenue.***

The Customs Court asked the question, is it necessary that the revenue officer be actually deceived in order to amount to a fraud on the revenue? The Court answered the question as follows;

We think not, because Chief Justice Hughes stated in the case of United States v. Citron, 223 U.S. 407, 56 L. Ed. 486-*** the dutiable classification of articles imported must be

ascertained by an examination of the imported article itself in the condition in which it is imported. This, of course, does not mean that a prescribed rate of duty can be escaped by resort to disguise or artifice. When it is found that the article imported is in fact the article described in a particular paragraph of the tariff act, an effort to make it appear otherwise is simply a fraud on the revenue and can not be permitted to succeed.

The Customs Court concluded that the facts seem to make a clear case of resort to disguise or artifice, and held that the sugar syrup was subject to the higher rate of duty applicable for raw sugars. The position of the Customs Court was affirmed by the Appeals Court.

The issue was again before the Court of International Trade in Arbor Foods, Inc., v. United States, 9 CIT 119 (1985). Certain sugar syrups and blends containing over 65 percent sugar by dry weight were subject to quota provisions of the tariff. Pure sugar from Canada was admitted into a foreign trade zone and there mixed with corn syrup of U.S. origin. The mixtures, containing 65 percent or less sugar by dry weight, were entered into the customs territory not subject to quota provisions. The mixtures were then screened to separate out the sugar component and the corn syrup solids were sent back to the foreign trade zone for use in the next batch. Customs issued instructions that only sugar blends possessing a "valid commercial identity and which are actually used in the commerce in the United States" would be exempt from a constructive segregation. The instructions placed the sugars blends in the quota provisions of the tariff. No evidence was submitted by the plaintiff to show a commercial use for the mixtures or that they had commercial identities, other than for the avoidance of the quota provisions. While using a "chief use" analysis, the Court, as in the Savannah Sugar Refining, supra, decided in favor of the government and held that the mixtures were subject to the quota provisions.

Customs has continued in its administrative rulings to follow the principles of the above court cases. In Headquarters Ruling Letter 222146, dated June 6, 1990, foreign microscopes were admitted into a foreign trade zone and there packaged with domestic or imported duty paid cameras as a combination article to gain a more favorable rate of duty upon entering the articles for consumption. After entry into the customs territory, the cameras were removed and sent back to the foreign trade zone for further use. Customs found that there was no intention to enter the cameras into the commerce of the United States and that the transactions were a "sham". The microscopes were held to be dutiable at the higher rate of duties,

We are also of the opinion that it was the intent of the Presidential Proclamations which we have reviewed the quota provisions applicable for the sugar syrups classified in the Tariff Schedules of the United States (TSUS) (1987) prior to the conversion to the HTSUS effective January 1, 1989.

Item 155.20, TSUS, provided for sugars, sirups, and molasses derived from sugar cane or sugar beets, principally of crystalline structure or in dry amorphous form, subject to absolute quantitative quotas for specific countries and subject to the Section 22 fees (Agriculture Agreement Act of 5/12/33, 7 U.S.C. 624, as amended).

Item 155.30, TSUS, provided for sugars, sirups, and molasses, derived from sugar cane or sugar beets, not principally of crystalline structure and not in dry amorphous form: containing soluble non-sugar solids (excluding any foreign substance that may have been added or developed in the product) equal to 6% or less by weight of the total soluble solids, also subject to absolute quantitative quotas for specific countries and subject to the Section 22 fees.

Item 155.35, TSUS, provided for "other", that is, sugars, sirups, and molasses over the 6%, rule which were not subject to quotas or the sugar fees.

Item 155.40, TSUS, provided for sugars, sirups, molasses, and mixtures thereof; all the foregoing deprived from sugar cane or sugar beets and containing soluble non-sugar solids (excluding any foreign substance that may have been added or developed in the product equal to over 6% by weight of the total soluble solids, if imported for use other than (a) the commercial extraction of sugar, or (b) human consumption. These products were not subject to quotas.

Item 155.75, TSUS, provided for sugars, sirups, and molasses, described in this subpart, flavored: and sirups, flavored or unflavored, consisting of blends of any of the products described in the subpart. Under item 958.10, blended sirups in item 155.75, containing sugars derived from cane or beet and capable of being further processed or mixed with similar ingredients and not for the ultimate consumer, and under item 958.15, articles containing over 65 percent by dry weight of sugars derived from sugar cane or sugar beets, were subject to a "none" absolute quota.

The HTSUS was effective on January 1, 1989. Heading 1701 covers raw and refined cane or beet sugars in solid form, containing and not containing flavoring or coloring matter. Heading 1702 covers other sugars including sugar syrups but it does not cover molasses. Heading 1703 covers molasses. Heading 1704 covers sugar confectionery.

The sugar and syrups (not molasses syrups), derived from sugar cane or sugar beets with the less than 6% rule, classified in item 155.30, became subheading 1702.90.30, subject to the absolute quotas and fees, and the "other" over the 6% percent rule classified in item 155.35, TSUS, became subheading 1702.90.40; HTSUS. Item 155.75, TSUS, in part, became subheadings 1702.30.40,1702.40.00, and

1702.60, HTSUS. However, there were two important changes in the HTSUS.

1. Molasses, as syrups, including the less than and the over the 6% rule classified in items 155.30 and 155.35, and molasses as a mixture with sugar syrups (for animal feed) classified in item 155.40, were separated out with their own heading 1703, HTSUS, not subject to quotas and fees. However, molasses resulting from the extraction or refining of sugar used for the commercial extraction of sugar or for human consumptions, classified in subheadings 1703.10.30 (cane) and 1703.90.30 (beet) were subject to high rates of duties .77 cents per liter (1989) and currently (1999), at .42 cents per liter. Molasses used for animal feeds were classified in subheadings 1703.10.50, and 1703.90.50, with low rates of duties.

2. Sugars and syrups derived from cane or beet over the 6% rule, not subject to quotas and fees in item 155.35 became classified in subheading 1702.90.40, subject to quotas and fees. This was corrected by Presidential Proclamation 6151, dated July 2, 1990 (55 FR 27171), which eliminated subheading 1702.90.40 from the quota notes of Chapter 17 and also made other corrections to insert and delete quotas.

Presidential Proclamation 6179, dated September 13,1990, eliminated the absolute quotas, and established low tariff rates for certain countries within quantitative limitations, and high tariff rate provisions for over the quantitative limitations and for other countries. Presidential Proclamation 6763, dated December 13, 1994, Paragraph 5, eliminated subheadings 9904.50.20 and 9904.50.40, the Rates of Duties for Section 22 Fees, and delegated to the US. Trade Representative and the Department of Agriculture to set quantitative limitations and the amounts for specific countries by notice in the Federal Register. However, new U.S. Additional Notes 2, 3, and 4 were inserted covering the provisions of subheadings 9904.50.20, 9904.50.40, with quantitative limitations. The tariff rate quota provisions, other than changes

in the quantitative limitations, have remained unchanged and we have low tariff duties within quantitative limitations, and high tariff rates for over the quantitative limitations. This is the scheme of the quota provisions for sugar classified in Chapter 17, HTSUS.

At this point in time, the sugar syrups subject to quotas under the HTSUS, were in sync with the quotas under the TSUS and the intent of the Presidential Proclamations. Prior to January 1, 1989, the sugar syrups in question, would have been classified in item 155.75, TSUS, subject to an absolute quota. There is no evidence that the conversion to HTSUS, intended to change the quotas and in this case, there is an artificial processing by Heartland to avoid the quota.

The Tariff Act of 1930, as amended, and the TSUS, treated molasses, a by-product from the refining of sugar cane and beets, differently from sugar and sugar syrups. The HTSUS clearly treats them differently. Raw sugar can be refined falling short of the less than 6% requirement or it can be further refined to the point until it has less than the 6% (of impurities). In both cases, the sugar is derived from cane or beet. Molasses is a by-product derived from the refining of sugar cane or beets. However, molasses is not sugar derived from the refining of sugar cane or sugar beets.

Subheading 1702.90.1000, HTSUS (1995), provides for other sugar syrups not containing added flavoring or coloring matter, derived from sugar cane or sugar beets, and containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6% or less by weight of the total soluble solids. The mixture of molasses with sugar is not a refining process for raw sugar, and the addition of water to such a mixture does not create a "sugar syrup" derived from a refining process From sugar cane or sugar beet. Since subheading 1702.90.10 and 1702.90.20 (the Current Tariff rate quotas for the 6% less rule) and subheading 1702.90.40, the over the 6% rule, only apply to sugar syrups derived from sugar cane

or Sugar beets, and does not include molasses or a mixture of sugar and molasses, the syrup consisting of a mixture of sugar and molasses, cannot be classified by virtue of GRI 1 in subheadings 1702.90.10/2 or 1702.90.40, unless the added molasses with its impurities are excluded. And then, the Sugar syrup would be classified by virtue of GRI 1 in subheadings 1702.90.10/20, subject to tariff rate quotas. We believe that molasses with its impurities is a foreign substance and excluded in determining the 6% rule of subheading 1702.90.1000, HTSUS.

Subheadings 1702.90.10, and 1702.90.20, HTSUS, provides for sugar syrups derived from sugar cane of sugar beets containing soluble non-sugar solids (excluding any foreign substances that may have been added or developed in the process) equal to 6% or less by weight of the total soluble solids. The sugar used in the process in Canada presumably met this criteria. The addition of the molasses to the sugar is a foreign substance containing impurities in producing the sugar syrup and, therefore, we exclude the molasses with impurities in calculating the 6% rule. Further, as stated, the conversion of the TSUS to HTSUS, and with the corrections of Presidential Proclamation 6151, indicate no intention to permit a syrup consisting of a mixture of sugar and molasses to be exempt from the quota provisions unless it was for use as animal feed.

There is a view that since the molasses is naturally found in sugar cane or sugar beets, it meets the requirements of subheadings 1702.90.10/20, HTSUS, in that it (molasses) is derived also from sugar cane or sugar beets. As stated above, molasses is derived as a by-product from the refining of sugar cane or sugar beets and it is not derived as sugar from the refining of sugar cane or sugar beets. Thus, molasses syrups are classified in heading 1703, HTSUS, and not in heading 1702, HTSUS.

The Explanatory Notes (EN's) to the Harmonized Commodity Description and Coding System, which represent the

official interpretation of Harmonized Tariff System at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the Headings and General Rules of Interpretation of the HTSUS. A view has been expressed that since the EN's state that heading 1701 "covers brown sugar consisting of white sugar mixed with small quantities of, e.g., caramel or molasses,* * *" it is permissible to add water to such sugar and molasses and have a sugar syrup in heading 1702. The EN's go on to state that "it should be noted that cane and beet sugar fail in this subheading only when in the solid form (including powders); such sugar may contain added flavoring or colouring matter." Subheadings 1701.11 and 1701.12 covers cane and beet syrups containing added flavoring or coloring matter. In addition, the EN's for sugar syrup, 1701.91 and 1701.99, covers cane and beet sugars that do contain added flavoring or coloring matter. However, for sugar syrups, heading 1702 provides for sugar syrups not containing added flavoring or coloring matter, therefore, the heading specifically excludes, sugar ups under heading 1702, specifically state "they do not contain added flavoring or colouring matter" and there is no indication that molasses is permissible.

We conclude that the sugar syrup in question would have been subject to quota under the TSUS, and as intended, the sugar quota provisions of the TSUS were carried over in the conversion to the HTSUS. The HTSUS at the four and six digit level represents the tariff at the international level. A further breakout is permitted at the national level beyond the six digit breakout, provided that the subheadings are covered by the heading at the international level of the Harmonized System to meet the needs of the individual members of the international system. Subheadings 1702.90.05 through 1702.90.40, HTSUS, at the eight digit level, fit the specific needs of the commerce of the United States and the quota provisions of the TSUS were carried over in the conversion to the HTSUS.

Accordingly, the TSUS quota provisions for sugar syrups may be considered to determine what was intended to be included or excluded from the sugar quota provisions of the HTSUS. We must conclude that sugar mixed with molasses with the addition Of water to make a syrup was not intended to be excluded from the quota provisions under the TSUS and the Presidential Proclamations, and such merchandise was excluded from the quota provisions if the merchandise was imported for animal feed. See item 155.40, TSUS, cited above. Otherwise, it was classified in item 155.75, TSUS, subject to absolute quota.

Holding:

For all of the reasons stated above, the sugar syrups as described in their condition as imported, are classified as sugar syrups derived from sugar cane or sugar beets, and containing soluble nonsugar solids (excluding any foreign substances that may have been added or developed in the product) equal to 6 percent or less by weight of the total soluble solids, in subheading 1702.90.1000, HTSUS, subject to the quantitative quota limitations of U.S. Additional Note 5 to Chapter 17. If the quantitative limitations have been reached, the syrups are classified in subheading 1702.90.2000, HTSUS, an over the tariff rate quota provision.

NYRL 810328 is revoked. In accordance with 19 U.S.C. 1625(c)L this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN DURANT,

Director, Commercial Rulings Division.